RECORD
AND
BRIEFS

No.

Supreme Court, U.S
FILED
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In The

Supreme Court of The United States

GUY MASSI,

Petitioner,

- against -

EDWARD FLYNN, individually and as Chief of Police of the Village of Mamaroneck, ROBERT HOLLAND, as a member of the Police Department, PHILLIP TRIFILETTI, as Mayor of the Village of Mamaroneck, WILLIAM J PAONESSA, Trustee, ANTHONY VOZZA, Trustee, CHRISTIE DERRICO, Trustee, JOSEPH ANGILETTA, Trustee, and THE VILLAGE OF MAMARONECK, NEW YORK,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION

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QUESTIONS PRESENTED

Question 1:

Does Petitioner have a valid Due Process Claim?

Question 2:

Does Petitioner, a Permanently appointed police officer and a disabled person classified as such by the Social Security Administration come within the ambit of *Enquist v. Oregon Agricultural Department* ___ . ____, 128 S. Ct. 2146 (2008)?

LIST OF PARTIES

The parties are those listed in the caption

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JURISDICTION

This Court's jurisdiction is invoked under 28 U S C §1254(1)

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

United States Constitution – Fourteenth Amendment

STATEMENT OF THE CASE

Petitioner Massi became a permanently appointed police officer in the Village of Mamaroneck, State of New York on February 7, 1994

On June 8, 2000 Petitioner was on duty when he when into a shop and was confronted on two separate occasions with a rifle carrying rapist The delayed onset of the damage of this incident later left Petitioner disabled

On June 1, 2001, Petition was promoted to sergeant

Defendant Flynn was the Chief of Police during all relevant times

To better understand the setting of the actions stated, the milieu of these occurrences is set forth in the Decision and Order (Smith, J) in a proceeding later commenced by Petitioner challenging his eventual suspension, Judge Smith stated that the these occurrences took place " against a back-drop of well

publicized serious police discord within the Village of Mamaroneck's Police Department which involves police officers' charges of misconduct by Chief Flynn, subsequent secret taping of conversations among members of the department, as well as a resultant federal lawsuit that has been brought against the Village of Mamaroneck and/or Village authorities This longstanding discord, while apparently not targeting petitioner as a participant, serves as the stage setting for the exacerbation and eventual emergence of his disability hereinafter described [1]

On April 8, 2004 Chief Flynn issued a Departmental Order directing petitioner to respond to questions concerning the alleged unauthorized recording of conversations This Departmental Order was in response to an action by Police Officer Skehan against Flynn and by the Departmental Order dated April 8, 2004, Flynn wanted Petitioner to help him in the action by Skehan

Petitioner responded in writing on April 13, 2004 essentially stating he had heard from a publically televised hearing that some recordings had been made but had not made any himself

On April 14, 2004 Chief Flynn ordered Petitioner to attend a meeting with him on April 16, 2004

On April 15, 2004, Petitioner was rushed to the hospital with severe chest pains and the records show that Petitioner had suffered an anxiety attack

By letter dated April 19, 2004 Chief Flynn wrote

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[1] Massi v Flynn et al, 5 Misc 3d 1001

to Petitioner and directed him to attend a "Fitness for Duty" evaluation on April 22, 2004 Petitioner appeared for this evaluation yet the employer's doctor was not present While waiting for the doctor, Petitioner suffered a severe anxiety attack The evaluation was rescheduled so that the employer could retain a psychiatrist and/or psychologist to evaluate the Petitioner

Petitioner's psychologist (Dr Griffin) advised Petitioner's employer by writing dated April 23, 2004 that Petitioner suffered from Acute Stress Disorder, that Petitioner was unable to perform his police responsibilities Dr Griffin also referred Petitioner for a Post Traumatic Stress Disorder ("PTSD") evaluation Upon the evaluation, Petitioner's psychiatrist (Dr Kaitz) diagnosed PTSD - Cronic and severe attributing it to job stress

On May 5, 2004 and May 19, 2004, Petitioner attended his Fitness for Duty evaluations The employer's doctors, Drs Klahr and Dubro, the latter a psychologist who never personally examined Petitioner, both diagnosed Petitioner with adjustment disorder Dr Klahr issued his opinion that Petitioner "might" benefit from a light duty assignment, a statement that Judge Smith in the New York State proceeding (*infra*) noted was not a "ringing endorsement" let alone a definite commitment" by Dr Klahr that "petitioner was fit for light duty "[2]

Judge Smith also noted in her Decision that "

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[2] Massi v Flynn et al, 5 Misc 3d 1001

Although subdivision 3 of section 207-c of the General Municipal Law grants municipalities the right to discontinue the salary of partially injured police officers who refuse to perform assigned light work, this great power may not be exercised summarily where, as here, the officer has received a permanent appointment

On or about May 25th, 2004 Petitioner was ordered to attend a (the rescheduled April 16, 2004 meeting) on June 2, 2004 By letter dated May 26, 2004, Dr Kaitz advised Chief Flynn that Petitioner is "medically ill and he is not fit to participate in an interview It is hard to determine when he will be fit "

Despite Dr Kaitz' letter, Chief Flynn issued two directives to Petitioner to return to duty on June 7, 2004 and to attend the June 2d, 2004 meeting Dr Kaitz again in a follow-up letter of June 1, 2004 stated that based upon his diagnosis, Petitioner was unable to attend the meeting or return to work

Petitioner did not attend the June 2, 2004 meeting, as he was being treated at a hospital emergency nor could he medically return to work as per Dr Kaitiz' previously asserted orders

On June 14, 2004 Chief Flynn preferred charges against Petitioner and suspended Petitioner without pay for failing to report to work and attend the meeting Petitioner was medically unable to perform these actions and, indeed, Dr Kaitz in previous orders that were known to Chief Flynn, had directed that Petitioner not perform such functions Petitioner claims that this suspension was retaliatory on behalf of the Village of

Mamaroneck and Chief Flynn because of Petitioner's failure to cooperate in the investigation of P O Skehan under the April 8, 2004 Departmental Order (infra) and aimed at denying Petitioner his GML207-c benefits ("207-c Benefits") [3] This suspension was in violation of the Rules and Regulations of the Mamaroneck Police Department which vest the power to suspend without pay only in the Village Board of Trustees The suspension was performed unilaterally by Chief Flynn and the Village Board never approved such summary action

Defendant Flynn's actions were unreasonable When he suspended Petitioner without pay, he failed to act as an objectively reasonable official would have He deliberately disregarded the evidence before him which included the medical report of Dr Ronald Kaitz, Dr Raymond Griffin, and Dr Klahr In short, all the reports reported that Petitioner suffered from PTSD

Defendant Flynn had never suspended any police officer without pay One police officer who failed to report for light duty was never suspended Said police office was hospitalized in his attempt to report for light duty That police officer remained on the payroll and was out on sick leave Another police officer was out on sick leave for as long as two years and always remained

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[3] New York General Municipal Law § 207-c provides in substance that police officers (or other municipal workers) who become disabled from an injury sustained in the performance of their duties, are entitled to the full amount of their salary and to medical costs paid by the municipality until the disability ceases or if the police officer is granted an accidental disability retirement

on the payroll

Petitioner was suspended without pay without a hearing in violation of the Department's Rules and Regulations

In violation of the rules and regulations, defendant Trustees did not conduct a hearing and permitted petitioner's suspension without pay without any investigation

After petitioner's suspension without pay, Chief Flynn and Defendant Holland willfully submitted false allegations against Petitioner and caused an investigation to be made based on those accusations as heretofore described

Admittedly, Chief Flynn's inquiries about P O Skehan only concerned reports that Skehan was repeatedly late for work

There is no evidence Petitioner told Chief Flynn that he never received any complaints about Skehan

Chief Flynn instigated what was he categorized as an "internal investigation" in retaliation against Petitioner for the July 19, 2004 charges He appoint Detective Holland the investigating officer

Holland interviewed selected officers Notably, however, there are no written signed and sworn statements against the Petitioner as part of this "internal investigation " Holland recorded his interviews and wrote his report yet destroyed the interview tapes This is clearly unconstitutional

In early June of 2004, Petitioner attempted to apply for the 207-c Benefits The defendants

deliberately delayed Petitioner's application by failing to respond to Petitioner's requests for application form Judge Smith found the delay was intentional so that Chief Flynn and the Village could use disciplinary authority to turn Petitioner's illness into a means of suspending him for failure to follow the two Departmental Orders [4] As of the time of the decision of that court (December 22, 2004), the proper form for applying for 207-cBenefits had still not been provided to the Petitioner (Id At pg 3), a delay of more than six (6) months!

On July 19, 2004 Flynn issued a Department Order charging petitioner with charges going back as far as 2001 It was never explained why such dated alleged violations were not pursued until some three years after occurrence The inference is clear that such allegations were used not as a disciplinary measure but for other purposes The charges concerned P O Skehan's alleged lateness, alleged lewd actions by Petitioner and alleged non-definable racial slurs by Petitioner At the time of the bringing of the charges in 2004, Skehan was the plaintiff in an action against Village of Mamaroneck, Chief Flynn and others (Skehan v Kelly , 03-civ-5977)

P O Kelly was the one who also gave Flynn information as to the alleged lewd remarks and the alleged purchase by Petitioner of recording devices by Petitioner Such accusations were not properly investigated to ascertain their truth Again, the reason

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[4] Massi v Flynn et al, 5 Misc 3d 1001 (pg 3)

for this is that Petitioner did not help Chief Flynn in the suit of P O Skehan against Chief Flynn

Also Detective Holland conducted an alleged investigation in which he conspired with Flynn against Petitioner As stated above, Holland conducted the investigation wherein he recorded the statements of police officers These statements included statements of P O Kelly and one P O Girardi Tellingly, there are also no written signed and sworn records of those statements and, presumably, the tapes of the interviews were destroyed by Detective Holland Both these officers were subsequently promoted to the rank of sergeant on June 5, 2005

The charges in the July 19, 2004 Departmental Order never were pursued by the prosecutors and there never was a hearing

The July 19, 2004 Departmental Order charges were instituted against Petitioner as a punishment for Petitioner in not aiding the Village or Chief Flynn in the lawsuit of P O Skehan against them and to deny Petitioner his 207-c Benefits

On July 31, 2004, petitioner was referred to PTSD Specialist, Laurence Kolman, Ph D and he continued under Dr Kolman's care on a weekly basis

Dr Kolman made a diagnosis of Post Traumatic Stress Disorder – chronic and severe with delayed onset, relating it to the critical incident that occurred on June 8, 2000 while Petitioner was in the line of duty In that incident, Petitioner was twice faced with a rifle-armed rapist at short range

Petitioner commenced a proceeding (previously mentioned) in New York State Supreme Court to challenge his dismissal The result of that proceeding was an Order which directed *inter alia* that the Village provide the Petitioner with a 207-c Benefits hearing and the defendants were reminded that GML 207-c should be liberally construed Judge Smith states "Here, it appears that Sgt Massie has sustained prima facie showing of entitlement to GML Law § 207-c benefits "

The 207-c Benefits "hearing" was finally held on April 25, 2005, approximately a year after Petitioner attempted to apply This hearing was not a hearing but just a review by which the employer denied the Petitoner his 207-c Benefits

Lt Matero was the "hearing" officer who conducted the hearing which was compelled by the mentioned proceeding She was also the alleged recipient of the lewd actions charged against Petitioner in the July 19 Departmental Order, charges that were never pursued by the charging authority nor was there ever any hearing

Chief Flynn, an attorney himself, testified that he relied on the Village counsel for an interpretation of said decision He was advised that they need only review medical documentation and made a determination According to Flynn, Petitioner's opportunity to be heard was satisfied merely by his submission of medical documentation

On June 25, 2005, Dr Kolman submitted a

report clarifying his diagnosis In his opinion, plaintiff suffers from PTSD and that "virtually anything connected in any way to one's employment situation could actuate the PTSD-related symptoms " It also stated that Petitioner was completely disabled

Defendants inhibited Petitioner's right to due process Their so-called hearing, allegedly held in compliance with the Order of Judge Smith, was conducted by an interested party, a member of their own department, who was not required to provide any documentation to substantiate her denial of 207-c benefits, and whose decision was based on submitted medical documentation

Petitioner was denied his right of due process by not being allowed to cross-examine the medical information supplied to Lieutenant Matero

Thereafter in response to a further order of Judge Smith (April 27, 2006), a 207-c Benefits hearing was conducted before one Vicent D'Andrea It is noted that D'Andrea was selected and paid by the defendants D'Andrea did not give proper weight to the Petitioner's medical evidence

No other police officer has been so treated as such by defendants

Petitioner had commenced a proceeding to overturn the decision of D'Andrea and such proceeding is pending

Petitioner was been classified disabled by the Social Security Administration as of April 15, 2004 and is currently receiving benefits

By Order (Siebel, J) dated October 14, 2008, Petitioner's complaint was dismissed and, upon appeal, the dismissal was affirmed by Summary Order of the Secon Circuit Court of Appeals dated November 24, 2009

ARGUMENT
REASONS FOR ALLOWANCE OF WRIT

I. PETITIONER HAS AN INTEREST PROTECTED BY THE DUE PROCESS CLAUSE

The due process clause of Article IV of the Constitution protects, *inter alia*, a property interest held by claimant that is unduly interfered with by state action

Petitioner demonstrates that he was denied due process because 1) he did not receive a timely hearing when he was seeking disability benefits under General Municipal Law §207-c, 2) he was suspended without pay by Chief Flynn in violation of the Rules and Regulations of the Mamaroneck Police Department (the Village Trustees only had that power), 3) he was given a 207-c hearing only when the defendants were ordered to after a judicial proceeding, 4) the officer who presided over the first "hearing" took no testimony from Petitioner, 5) the officer who presided over the first "hearing" was a member of the police force, the object of alleged lewd actions made by Petitioner and therefore interested and biased, 6) the defendants only held a hearing on Petitioner's 207-c benefits after being ordered by the New York State Supreme court, 7) in the 2nd "hearing" the officer's conclusions failed to give proper weight to the medical evidence presented by the Petitioner, 8) the detective who conducted the disciplinary investigation purposefully destroyed evidence and the charges that were brought against Petitioner under the July 19, 2004 Departmental Order have never been prosecuted

In essence, Petitioner is alleging a conspiracy to first remove him from his employment as a police officer and then to deny him the benefits under General Municipal Law §207-c

The Second Circuit stated that "because he was ineligible for disability benefits" Petitioner had "no property interest in such benefits – a predicate showing for a due process claim (Summary Order dated November 24, 2009)

The issue of Petitioner's retirement benefits is not settled and Petitioner is not "finally" ineligible for benefits Although, there was a decision by a hearing officer chosen by the defendants denying those benefits, Petitioner had commenced a proceeding seeking *inter alia* to overturn that decision (Massi v Flynn, *et al* , New York State Supreme Court, 10950-2004) which has been transferred to the Appellate Division, Second Department The Petitioner is claiming that the decision was arbitrary and capricious That matter is *sub judice*

Also, a fair reading of the Complaint sets forth a conspiracy with Flynn, Holland and Mateo as the principal actors Even though Petitioner may be classified as an at-will employee, such an allocation of a conspiracy denying due process requires no showing of a property interest *Haddle v Gains*, 525 U S 121, 119 S Ct 489 (1998)

II. ENQUIST SHOULD NOT BE APPLIED TO PETITIONER'S CLAIM

The Second Circuit applied *Enquist v Oregon Department of Agriculture*, ____v _____ 129 S Ct 2146 (2008) stating the "class of one" does not apply in the public employment area

Although the Court did not discuss the facts, it is important to note that there are equal protection viable claims alleged, as evidenced by the Memorandum and Order in this matter of Hon Charles Brieant (deceased) dated February 1, 2005